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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROY RANDALL GUSTAFSON, Defendant and Appellant.	E051748 (Super.Ct.Nos. FVI702850 & FVI802576) OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey and Brian S. McCarville, Judges.[1] Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr., and Lilia E. Garcia, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

[1] Judge Kersey presided over defendant's trial, while Judge McCarville presided over the hearing on defendant's petition for writ of habeas corpus.

Following a jury trial, defendant Roy Randall Gustafson was convicted of one count of first degree murder (Pen. Code, § 187, subd. (a)), with a true finding that he personally discharged a firearm causing great bodily injury and death within the meaning of Penal Code section 12022.53, subdivision (d); three counts of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)); one count of possession of ammunition by a felon (Pen. Code, § 12316, subd. (b)(1)); one count of assault with a firearm (Pen. Code, § 245, subd. (a)(2)); and one count of false imprisonment (Pen. Code, § 236). The jury also found true the allegation that defendant personally used a firearm in the commission of the assault with a firearm and false imprisonment (Pen. Code, § 12022.5, subd. (a)). In a bifurcated proceeding, the court found true defendant's two prior strike conviction allegations (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). He was sentenced to state prison for a total term of 150 years to life.

Defendant appeals, contending: (1) the trial court erred in admitting evidence of a prior domestic violence incident; (2) he was denied the benefit of his bargain when the trial court refused to restructure his guilty plea in one case to allow imposition of the sentence that was agreed upon; and (3) the trial court erred in admitting evidence of certified court and prison records to prove his two prior strike convictions allegations. Finding no error, we affirm.

I. PROCEDURAL BACKGROUND AND FACTS

This case involves two separate cases that were consolidated, namely, San Bernardino Superior Court case No. FVI802576, involving the murder of Paul Camarillo, and case No. FVI702850, involving the assault and false imprisonment of Crystal Peron.

A. Evidence Regarding the Murder of Paul Camarillo

Camarillo, who was about 86 years of age, lived alone on Sage Street in a rural area of Phelan. He was known to carry large amounts of cash, $800 to $1,000, in his pocket. In August 2007, Camarillo hired defendant as a handyman and allowed defendant to live on his property in a two-bedroom building behind his residence. In November or December 2007, defendant stopped working for Camarillo, who was last seen alive on December 22 by a neighbor, Lindy Moore. In January 2008, Moore became concerned about Camarillo. She had not seen him at home, and his dog had escaped from the property to come into her yard for food. Moore called the sheriff's department to report Camarillo missing; however, a missing person's report was not filed until March 5, 2008.

Camarillo's residence was searched and a receipt for the sale of a Marlin .22-caliber rifle was found. The serial number listed on the receipt matched the serial number of the Marlin .22-caliber rifle found in defendant's possession when he was arrested on January 24, 2008.

On August 12, 2008, Camarillo's skeletal remains were found in a shallow grave in a remote desert area near Victorville and Adelanto. An autopsy showed Camarillo was killed by a single gunshot to the head. The bullet had entered the right eye socket and traveled front to back, downward and slightly right to left. The bullet was embedded at the base of the skull and was recovered by the pathologist. The pathologist opined the body had been in the desert three to four months before being discovered, or possibly since December 2007.

Defendant's cell phone records showed that he placed a call to a friend, Claudia Jones, on December 29, 2007. Jones said she had received a voicemail message from defendant saying he was in trouble. Defendant's cell phone showed a failed text message dated December 29, 2007, at 7:38 p.m. The message said, "Paul came after me with a masheddy [*sic*] because I stole $300 from him." In another message dated the same day, defendant repeated the same message, with the addition, "I love ya, momma."

On the evening of December 24, 2007, defendant telephoned his brother, Rudolph Gustafson, saying he had "goofed up big" and shot and killed his roommate, an older man. Defendant said he lived with the gentleman and did odd chores for him to help pay for his rent. Defendant said he shot him at the house because the roommate had "come at him with a machete."

Defendant was arrested on January 24, 2008. He was in possession of a sawed-off .22-caliber Marlin rifle and .22-caliber rounds. Criminalist William Matty compared the bullet recovered from Camarillo's skull with a bullet test fired from the Marlin .22-caliber rifle found in defendant's possession. Matty opined the two bullets could have been fired from the same gun.

B. Evidence Regarding Domestic Violence Case

In November 2007, defendant and Crystal Peron were in a dating relationship, although they were not living together. According to Jerry Askar, Peron's landlord and friend, defendant and Peron had a tumultuous relationship with frequent arguments. On the evening of November 24, Askar became concerned because he had not heard from Peron in a few days, and they usually spoke daily. Askar went to the trailer where Peron

was living and, using his key, went inside. He went to Peron's bedroom and the door was locked. He knocked and called to her. Eventually, she answered. Peron told Askar she was fine and to "just go away." Askar was suspicious but told her he would leave and return at 7:00 a.m., and that whoever was with her had better be gone by then.

That same day, Askar called three friends, who agreed to go with him to the trailer to check on Peron. The group arrived at the trailer at approximately 1:00 a.m., went inside and knocked on the bedroom door, demanding to be let in. Peron replied and told them to go away. They forced the door open, and Peron ran out quickly. Peron was scared; she was screaming and telling the group to be careful because defendant was inside the room with a gun and had been holding her hostage. Defendant was inside the bedroom pointing a shotgun or rifle at the group. Askar told defendant to put down the gun, but he refused. Askar asked defendant to put the gun down and leave the property. Eventually defendant complied, but as he was leaving, defendant fired four or five times. The group later found several bullet holes inside the trailer.

C. Other Evidence

On January 24, 2008, defendant was taken into custody. He was found hiding under a bush and tried to run away when he was apprehended. Under the bush where defendant was hiding was a sawed-off short .22-caliber Marlin rifle.[2] Defendant volunteered that he had tossed away another gun as he ran away. The deputies searched

[2] The rifle was registered to Camarillo and could have been the rifle that fired the bullet that killed him.

the area where defendant said he had thrown it and found a small .22-caliber handgun. Defendant had a small bag full of .22-caliber rounds in his pockets.

Peron was taken into custody with defendant. On the way to the station, the two argued. Peron asked defendant about the guns, and defendant said he had been on the run for several months, was cold, hungry, and tired, and he had the guns for protection. Peron asked defendant why he had kidnapped her; however, he denied doing so, claiming he thought she was using drugs and he held her until she sobered up.

Melissa Weber testified that on May 9, 1996, she was staying with defendant, her former boyfriend, in a motel room when he started saying unusual things, such as he had been implanted with a chip from the CIA or some government agency to do things, and that Weber had also been implanted so she could spy on him. When defendant said he would kill her and her baby, she became alarmed and went across the street to a bar to ask the bartender to call the police. At the bar, Weber turned around and saw defendant standing beside her with a knife. She struggled with him and was stabbed in the back, side, and back of the neck. She suffered nerve damage to her spine and was unable to walk afterwards. She came to court in an electric wheelchair. Weber stated her right side "doesn't really work," but is hypersensitive to touch, causing her a lot of pain. Her left side works somewhat, but has no feeling. She has chronic pain and takes medication daily.

Weber admitted she and defendant had been using methamphetamine during the time of the stabbing incident.

D. Defense

Defendant called Deputy Craig Roberts. Roberts testified that on December 18, 2007, while traveling home on Highway 138, he noticed a vehicle entering the highway from a dirt road that almost collided with the vehicle in front of his car. Roberts made a note of the license number and attempted to run it through the sheriff's department mobile computer system, but he could not get reception. He was also unable to reach dispatch or fellow deputies by his cell phone.

II. ADMISSION OF EVIDENCE OF PRIOR DOMESTIC VIOLENCE

Defendant contends the trial court prejudicially erred when it admitted evidence of his unrelated 1996 domestic violence incident.

A. Further Background Facts.

Before trial, the prosecution moved in limine to admit Evidence Code section 1109 evidence of defendant's prior domestic violence committed in 1996 involving the stabbing of his girlfriend. As a result of the incident, defendant was convicted of assault with a deadly weapon with personal use of a knife. Defense counsel objected.

At the hearing on the motion, defense counsel acknowledged that Evidence Code section 1109 allowed for the admissibility of the evidence; however, he argued the evidence should be excluded under the principles of equal protection and as more prejudicial than probative under Evidence Code section 352. According to defense counsel, the evidence lacked sufficient similarities to the instant charges and was remote in time. Acknowledging the incident had occurred more than 10 years ago, the prosecution pointed out that defendant had not led a law-abiding life; he had served six

years in prison, was released in 2003, and four years later, in 2007, he committed the instant offense against Peron. Thus, the prosecution reasoned that the prior domestic violence incident was not remote, given the fact that defendant had gone only four years without committing a crime. Furthermore, the prosecution argued that the evidence was more probative than prejudicial, because both incidents involved "inexplicable violence done on someone using a deadly weapon."

After considering the evidence and arguments of counsel, the trial court ruled the evidence was admissible and more probative than prejudicial. The court found that the incident was not remote and was similar to defendant's present charge involving Peron, and that because the past act could be proved through the testimony of a single witness, it would not consume an undue amount of time. Weber testified regarding the incident when defendant stabbed her. Immediately after her testimony, the jury was instructed with a shortened version of CALCRIM No. 852 regarding evidence of uncharged acts of domestic violence.

At the conclusion of trial, the court gave the full version of CALCRIM No. 852. After closing argument, and at the request of defense counsel, the court clarified for the jury that the evidence of the prior incident of domestic violence applied only to the present domestic violence counts involving Peron. The court further instructed that the evidence of the prior domestic violence "is not sufficient by itself to prove that the defendant is guilty of false imprisonment and assault with a firearm of the alleged victim, Crystal Peron. The People still must prove each crime and allegation beyond a reasonable doubt."

The jury later found defendant guilty of assault with a firearm and false imprisonment, and returned a true finding that defendant personally used a firearm to commit those counts.

B. Analysis

Defendant urges that the trial court erred in admitting Weber's testimony concerning a past uncharged incident of domestic violence. He notes that, generally speaking, prior bad acts are inadmissible to prove a propensity to commit such bad acts, but are to be admitted only to prove some other fact in issue, such as motive, opportunity, lack of mistake, intent, identity, and so on. (See Evid. Code, § 1101, subd. (b).) In 1995, the Legislature added Evidence Code section 1108 to permit a partial exception to the general rule for sexual offenses, and the following year the Legislature added a similar exception for domestic violence. Evidence Code section 1109 provides in part: "Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(1).)

In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), the California Supreme Court considered a challenge to the constitutionality of Evidence Code section 1108 permitting propensity evidence in sexual offense cases. The court held that the propensity evidence was admissible only if it was also admissible under Evidence Code section 352. (*Falsetta*, *supra*, at p. 917.) "Thus, there is an overriding safety valve built

into [the] statute that continues to prohibit admission of such evidence whenever its prejudicial impact substantially outweighs its probative value. ([Evid. Code,] § 352.)" (*People v. Johnson* (2010) 185 Cal.App.4th 520, 529 (*Johnson*).) The same is true of both Evidence Code sections 1108 and 1109. Therefore, even though the California Supreme Court has not ruled directly on the constitutionality of Evidence Code section 1109, defendant acknowledges that by parity of reasoning with *Falsetta*, the Courts of Appeal "have uniformly [held that] [Evidence Code] Section 1109 does not offend due process. [Citations.]" (*Johnson*, *supra*, at p. 529.) Nonetheless, defendant contends "[t]hat protection is irrelevant . . . if the discretion is not exercised by the trial court." Here, defendant argues that the trial court "erred in failing to exclude [the] evidence . . . as inflammatory, remote, and largely irrelevant evidence."

When a court decides to admit evidence under Evidence Code sections 1109, subdivision (a)(1) and 352, we review that decision for abuse of discretion. (*People v. Branch* (2001) 91 Cal.App.4th 274, 280- 282.) Defendant has shown no abuse of discretion.

Under the facts of this case, defendant was charged with assault with a firearm and false imprisonment of his girlfriend, Peron, over a two-day period in which he held her hostage with a gun in her home. Ten years earlier, defendant held his girlfriend, Weber, hostage in a motel room and also assaulted her with a knife. In deciding whether the incident against Weber should be admitted under Evidence Code sections 1109 and 352, the trial court evaluated and weighed the probative value of the evidence against the prejudicial effect and concluded the prior incident was admissible. Regarding

remoteness, the court noted that defendant's current offense occurred within four years of his release from prison for the 1996 offense. Regarding similarities between the two incidents, in each case, defendant's actions against his girlfriends were unprovoked.

Furthermore, the probative value of defendant's prior incident of domestic violence was not substantially outweighed by the danger of undue prejudice. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405, superseded by statute as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) To begin with, as the People point out, defendant's prior crime "bore strong similarities to the present crime: neither victim provoked [him] before he assaulted them with deadly weapons; and he held the[m] hostage; Weber in a motel room and Peron in her bedroom of her home. His attack upon defenseless women shows that [he] had a propensity toward committing this type of offense as [a]way of controlling them." Second, the evidence of the prior offense against Weber is independent of the evidence of the offense against Peron. And finally, the evidence of defendant's offenses against Weber is no more inflammatory than those against Peron.

Significantly, defendant has not cited any decision in which the court excluded evidence offered pursuant to Evidence Code section 1109 based on Evidence Code section 352. Rather, he relies on one decision excluding evidence offered pursuant to Evidence Code section 1108, the analogue to Evidence Code section 1109 for evidence of prior sex offenses. That decision, *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*) is not fairly comparable to this case.

In *Harris*, the defendant was accused of sexually molesting two state hospital patients while he served as a nurse at the hospital. (*Harris*, *supra*, 60 Cal.App.4th at pp.

730-732.) The molestation involved kissing and fondling, and in one case, arguably consensual sexual intercourse. Pursuant to Evidence Code section 1108, the prosecution introduced evidence that 23 years earlier, defendant had violently raped a woman who lived in his apartment complex. (*Harris, supra*, at p. 733.) When the police found the victim, she had blood on her vagina and mouth area, along with swelling on the right side of her face. In fact, one of the officers testified he "'couldn't tell if she was injured in the crotch and lower stomach area or not due to the blood.'" (*Id*. at p. 734.) The defendant was apprehended at the scene, with blood on his pants, his shorts, and his penis. The Court of Appeal found the evidence was remote in time, inflammatory, and "nearly irrelevant." In fact, the only similarity between the prior incident and the current offenses was that both involved sexual conduct. (*Id*. at pp. 738, 741.) Therefore, the evidence should have been excluded under Evidence Code section 352. (*Harris, supra*, at p. 741.)

This case did not involve anything approaching the disparity between the prior and current incidents. Rather, the incidents were violent and substantially similar,[3] so as to make the prior incident involving Weber substantially probative to show defendant's propensity to commit domestic violence against Peron. The prior Weber incident was not unduly remote, having occurred 10 years earlier. The potential for prejudice, if there was any, was due to the similarity of the incidents. Prejudice of that nature inheres in any

[3] In another attempt to distinguish the two incidents involving Weber and Peron, defendant points out that he stabbed Weber because of his mistaken belief they had both been implanted with a chip by the government and she was spying on him. While he was not under the same belief regarding Peron, we note he claimed to believe that Peron was under the influence of drugs. This suggests another similarity.

proper introduction of prior domestic violence evidence under Evidence Code section 1109 and is not a basis for exclusion. Evidence is not prejudicial for purposes of Evidence Code section 352 simply because it is damaging to the defendant. (*People v. Smith* (2005) 35 Cal.4th 334, 357.)

To the extent defendant contends he was prejudiced because the jury was unable to limit consideration of the evidence of his prior domestic violence to the present domestic violence counts involving Peron, we reject his claim. As previously noted, the jury was specifically instructed, on two separate occasions, that it may consider only the Evidence Code section 1109 evidence in assessing guilt on the counts involving Peron. Defendant's belief that he was prejudiced amounts to pure speculation. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Moreover, as the People note, the jury acquitted defendant of three charges, showing that the jurors limited their consideration of the Evidence Code section 1109 evidence as instructed.

Based on the above, we conclude that the trial court did not err in admitting evidence of the incident involving Weber.

III. ENTITLEMENT TO PLEA BARGAINED SENTENCE

In 2008, defendant pled guilty to assault with a firearm and negligent discharge of a firearm, along with admitting to personally using a firearm in the commission of assault with a firearm in case No. FVI702850 (involving Peron), in exchange for a stipulated term of seven years eight months, dismissal of the remaining charges pursuant to Penal

Code section 1385, and a promise that he would be eligible for half-time custody credits against his sentence pursuant to Penal Code section 2933.1.

After defendant began serving his sentence, he was informed that his admission of the firearm use allegation elevated his assault conviction to a violent felony, for which he was subject to the 15 percent limitation of Penal Code section 2933.1, which meant he would have to serve 85 percent of his sentence. He filed a petition for writ of habeas corpus to set aside the plea agreement based on the misunderstanding that he was not eligible for half-time credits. Against counsel's advice, defendant chose to proceed with the writ of habeas corpus. The petition was granted and the plea was withdrawn. Subsequently, the charges resulting from his incident with Peron were reinstated, and then consolidated with the murder charges in case No. FV18002576 involving Camarillo. Following trial, defendant was convicted of assault with a firearm and false imprisonment of Peron with true findings as to each count that he personally used a firearm. In a bifurcated proceeding, the trial court found defendant's two prior strike convictions to be true. He was sentenced on the assault with a firearm, which, because of his prior strikes, resulted in a sentence of 25 years to life.

On appeal, defendant complains he should have received a sentence that was close to the initial seven years eight months, which he had originally received from his plea bargain. The People disagree, arguing that the sentence contemplated in the plea bargain "was an unauthorized and illegal sentence, and could not be enforced. As such, the only remedy was to set aside the plea and return the parties to status quo ante and reinstate all of the charges." We agree with the People.

Penal Code section 1192.5 governs the procedure for plea bargaining and provides that the trial court's approval of a plea bargain is conditional. If the court, for any reason, cannot effectuate the terms of a plea bargain, it must allow the defendant to withdraw his or her guilty plea. (*People v. Pinon* (1973) 35 Cal.App.3d 120, 125.) Because the plea bargain must comply with the sentence mandated by our Penal Code, a trial court has no discretion "to make its own ad hoc adjustment to fit what it perceives as equity and justice." (*In re Chamberlain* (1978) 78 Cal.App.3d 712, 718.) The Legislature possesses the sole authority to determine the appropriate punishment for criminal behavior. (*People v. Tanner* (1979) 24 Cal.3d 514, 519, fn. 3.) Thus, even if all the parties, defendant, prosecutor and the court agree on a sentence, the court cannot give effect to it if it is not authorized by law. (*People v. Harvey* (1980) 112 Cal.App.3d 132, 139.) Plea agreements are contractual in nature and are subject to contract interpretation (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1360); however, a defendant is not entitled to specific performance of an illegal term of a plea agreement. (*People v. Jackson* (1981) 121 Cal.App.3d 862, 869 (*Jackson*).)

In *Jackson*, the prosecution agreed to drop first degree murder charges and the special circumstance allegations in exchange for the defendant's guilty plea to two counts of second degree murder, one count of kidnapping, and his admission of the use allegations. (*Jackson*, *supra*, 121 Cal.App.3d at p. 867.) The trial court then sentenced the defendant consistent with the plea recommendation and ordered him to serve nine years on the murder charges. (*Ibid.*) However, Penal Code section 190, the statute upon which the plea was based, had been repealed and replaced with a statute making the

minimum sentence 15 years to life. (*Jackson*, *supra*, at pp. 867-868.) The appellate court held that when the trial court learned the agreed-upon sentence was illegal, the defendant had two choices: He could demand the "benefit of his bargain" by choosing to be sentenced according to the valid, though higher, penalty of 15 years to life; or he could withdraw his guilty plea and take his chances at trial. (*Id*. at p. 870.)

The situation here is analogous to that in *Jackson*. There is no doubt that defendant's original plea bargain was illegal. His admission to the personal use of a firearm elevated his assault conviction to a violent felony triggering the reduced 15 percent custody credit provisions of Penal Code section 2933.1. Defendant was not entitled to 50 percent custody credits, and the trial court had no discretion to make its own adjustment approving an agreement between defendant and the prosecutor which provided as such.

Defendant could have accepted the original plea bargain and the reduced 15 percent custody credits, but he chose not to. Thus, the court was required to grant his petition to withdraw his plea. At that point, the prosecution was entitled, and elected, to reinstate all of the dismissed charges. (*People v. Calloway* (1981) 29 Cal.3d 666, 668.) Accordingly, we reject defendant's claim that the trial court was required to restructure the plea agreement, keeping the favorable terms, while rejecting the unfavorable ones.

IV. PENAL CODE SECTION 969b PACKET AND CONFRONTATION CLAUSE

Defendant contends the admission of certified prison and court records to prove his prior conviction allegations violated his Sixth Amendment right of confrontation and cross-examination. We disagree.

A. Further Background Facts

It was alleged that defendant had suffered two prior strike convictions, a San Bernardino 1997 assault with a firearm conviction, and a 1988 Michigan felony breaking and entering an occupied dwelling with intent conviction (equivalent to residential burglary under Penal Code section 459). These two convictions were alleged as strike priors. On May 20, 2010, a court trial on the strike allegations was held. The prosecutor offered Exhibits 130 (a certified set of court documents from San Bernardino County), 131 (fingerprint card from March 31, 2010), and 132 (defendant's Penal Code section 969b packet containing certified records relating to his prior conviction, including an abstract of judgment, a fingerprint card, a chronological movement history, and a photograph). To prove defendant's Michigan conviction, the prosecutor offered Exhibits 128 (certified copy of the Michigan Information), 129 (certified copy of the Michigan judgment of sentence showing the date of a plea), and 133 (certified copy of a Michigan fingerprint card). Fingerprint examiner Melissa Morrell compared prints obtained by law enforcement shortly before trial with a fingerprint card contained in documentary evidence of a 1997 Michigan conviction and in a Penal Code section 969b packet.

Defense counsel stipulated that Exhibit 131 was a fingerprint card that was the result of a Detective Johnson rolling defendant's prints on March 31, 2010, and that it contained defendant's signature as witnessed by Detective Johnson. However, counsel objected to the admission of the above-referenced exhibits on the grounds of lack of foundation and violation of defendant's Sixth Amendment right to confrontation. The

trial court overruled the objection and then found the two prior strike conviction allegations true beyond a reasonable doubt.

B. Analysis

Defendant contends the admission of fingerprint and other documentary evidence violated his right to confront and cross-examine witnesses. To the extent defendant is arguing that the information in his prison priors packet (Pen. Code, § 969b) violates the Confrontation Clause, we reject this argument based on the reasons stated in *People v. Larson* (2011) 194 Cal.App.4th 832, 837-838 (Fourth Dist., Div. Two). To the extent that he is arguing the prosecution was required under *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527, 2529, 174 L.Ed.2d 314] (*Melendez-Diaz*) to authenticate the prior fingerprints with testimony from the technicians who took the fingerprints, we disagree.

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment (*Pointer v. Texas* (1965) 380 U.S. 400, 401, 403) provides that "'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .'" In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) the United States Supreme Court held that the Sixth Amendment guarantees a defendant's right to confront "those who 'bear testimony'" against him. (*Crawford, supra,* at p. 51.) Testimonial statements of a witness who does not appear at trial are inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. (*Id.* at pp. 53-54.) Whether a statement is

testimonial presents a question of law, which we review de novo. (See *People v. Seijas* (2005) 36 Cal.4th 291, 304.)

A determination as to whether a statement is testimonial is key to deciding whether a defendant's right to confront or cross-examine witnesses has been violated. In *Crawford,* the United States Supreme Court recognized several types of "testimonial" statements, including, but not limited to, ex parte in-court testimony or its functional equivalent, i.e., material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements, and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be used at a later trial. (*Crawford, supra,* 541 U.S. at pp. 51-52; *Melendez-Diaz, supra,* 557 U.S. at p. ___ [129 S.Ct. at p. 2531].) While the *Crawford* court articulated the above "core class of 'testimonial' statements" covered by the confrontation clause, it left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" (*Crawford, supra,* at pp. 51, 68, fn. omitted.)

The Supreme Court clarified the nature of a testimonial statement in *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*). In *Davis*, the court considered statements made by victims of domestic violence in two different cases. In one case, the challenged statement was the victim's statement to a 911 operator; in the second case, the challenged statements were made by the victim to officers who responded to a report of a domestic disturbance, and in an affidavit. (*Id*. at pp. 817, 819.) The high court formulated the following rule to decide both cases: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary

purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id*. at p. 822, fn. omitted.) Applying this rule to the two cases, the court held that the statements to the 911 operator in the first case were not testimonial, and the statements made to the officers and in an affidavit in the second case were testimonial. (*Id*. at pp. 829-830.)

The California Supreme Court considered the application of the confrontation clause to forensic laboratory reports in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*). In that case, the California Supreme Court reviewed *Crawford*, *Davis*, and other confrontation clause cases to determine whether allowing the prosecution's DNA expert to testify based on another unavailable analyst's test results was a violation of the Sixth Amendment. (*Geier*, *supra*, at p. 596.) In holding such testimony was permissible because it was not based on testimonial statements, the court in *Geier* explained that a hearsay statement "is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*Id*. at p. 605.) The court in *Geier* held that DNA testing reports do not meet the second criterion because they "constitute a contemporaneous recordation of observable events rather than the documentation of past events." (*Ibid*.)

The *Geier* court also concluded that when analysts performing DNA testing contemporaneously record their actions, observations, and test results, they are not acting

to incriminate a defendant because their reports have the potential to be either inculpatory or exculpatory. Therefore, even though analysts may be working for the police and can reasonably anticipate the use of the test results at trial, they are not acting as accusatory witnesses, making testimonial statements when they prepare their reports. (*Geier*, *supra*, 41 Cal.4th at pp. 605-607.) The court in *Geier* thus held the DNA testing report was not testimonial, and that admission of the report, even though defendant was unable to cross-examine the analyst who prepared it, did not conflict with *Crawford* or violate the defendant's Sixth Amendment rights. (*Geier*, *supra*, at pp. 605-607.)

After *Geier* was decided, the United States Supreme Court held in *Melendez-Diaz* that the Sixth Amendment precluded admission into evidence of affidavits by government laboratory analysts verifying that a seized substance was cocaine. (*Melendez-Diaz, supra*, 557 U.S.at p. __ [129 S.Ct. at pp. 2531-2532].) The Supreme Court concluded the affidavits were testimonial statements because they were the functional equivalent of live, in-court testimony and were "'"made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.'" . . . ." (*Id*. at p.__ [129 S.Ct. at p. 2531.) Additionally, the court in *Melendez-Diaz* concluded the analysts were accusatory witnesses because the affidavits proved facts necessary to the prosecution's case. (*Id*. at p. __ [129 S.Ct. at pp. 2533-2534.)

Defendant argues that *Melendez-Diaz* implicitly rejected the *Geier* court's reasoning supporting its holding that DNA testing reports are not testimonial. The California Courts of Appeal are in disagreement as to whether *Geier* remains good law

after *Melendez-Diaz*, and this issue is currently pending before the California Supreme Court. The People fail to offer any argument on the viability of *Geier*. Moreover, the People do not even address defendant's main contention that the admission of his fingerprint evidence violated the Confrontation Clause.

We conclude that *Geier* remains controlling law since it is distinguishable from *Melendez-Diaz*. In *Geier*, a witness subject to cross-examination was allowed to rely on DNA data in reports prepared by others, and to offer expert opinion testimony regarding the data. (*Geier*, *supra*, 41 Cal.4th at p. 607.) In *Melendez-Diaz*, the prosecution sought to admit an incriminating affidavit in which neither the author nor the author's supervisor was subject to cross-examination. In addition, the affidavit was not prepared contemporaneously with the testing and was not a business record. Rather, the affidavit was prepared about a week after the tests were performed solely for use as evidence at trial. (*Melendez-Diaz*, *supra*, 557 U.S. at p.__ [129 S.Ct. at p. 2535].)

Here, the fingerprint evidence did not violate defendant's constitutional right to confrontation and cross-examination. To begin with, we note the courts have agreed that latent fingerprint reports are business records. (*People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1223.) While some courts have split on whether such reports are testimonial (compare *People v. Hernandez* (2005) 7 Misc.3d 568, 794 N.Y.S.2d 788, 789 [latent print report may be a business record, but it is testimonial because the fingerprints "were taken with the ultimate goal of apprehending and successfully prosecuting a defendant"] with *State v. Arita* (La.Ct.App.2005) 900 So.2d 37, 45 [latent fingerprint report is a public record and is nontestimonial hearsay evidence]), our state's highest

court has identified fingerprints as nontestimonial evidence. (*Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1114, superseded by statute as stated in *People v. Gonzales* (2011) 51 Cal.4th 894, 927; see also *Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, 41, fn. 5.) As observed by the *Melendez-Diaz* court, "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." (*Melendez-Diaz, supra,* 557 U.S. at p. __ [129 S.Ct. at pp. 2539-2540.) The fingerprints contained in defendant's Penal Code section 969b, (or the equivalent for out-of-state) packets were business and public records created for the administration of the entities' affairs and not for the purpose of establishing or proving some fact at trial. Accordingly, they are not testimonial.

V. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.